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Contracts--Specific Performance of Building Contract--Arbiter's Award of Specific Performance Confirmed by Court (Grayson-Robinson Stores, Inc. v. Iris Constr. Corp., 8 N.Y.2d 133 (1960))

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faith and credit or possibly, violation of due process,[30] merit serious consideration.

CONTRACTS—SPECIFIC PERFORMANCE OF BUILDING CONTRACT—ARBITER'S AWARD OF SPECIFIC PERFORMANCE CONFIRMED BY COURT. Appellant construction company agreed to erect a five million dollar building upon its own land for subsequent rental to respondent. The contract provided for arbitration of all disputes and empowered the arbiter to grant specific performance. The Court of Appeals, affirming the confirmation of an award of specific performance, *held* that the Supreme Court had acted properly in confirming the award, since, had this matter appeared directly before the court in a suit requesting equitable relief, the court would not have abused its discretion by granting specific performance under the facts of the case. *Grayson-Robinson Stores, Inc. v. Iris Constr. Corp.*, 8 N.Y.2d 133, 168 N.E.2d 377, 202 N.Y.S.2d 303 (1960).

The *Grayson-Robinson* case bears a striking resemblance to the hotly-discussed *Matter of Staklinski*,[1] in which the Court of Appeals confirmed an arbitration award of specific performance which required an employer to continue in its service an officer whom it considered disabled. Both cases came before the court as arbitration awards of specific performance requiring confirmation. Both awards granted affirmative relief in areas where courts of equity have traditionally declined to do so. Both were confirmed by a sharply divided court. In *Matter of Staklinski* the plaintiff received from the court only what he requested—confirmation, nothing more, nothing less. There was not the slightest suggestion that if the merits had appeared originally before the court the result would have been the same.[2] The majority opinion in *Grayson-Robinson*, however, would appear to contain a far different implication. Chief Judge Desmond states that:

> [A]ssuming that the equity court in an original suit would have discretion to refuse specific performance, and even making the very large assumption that

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[30] See generally GOODRICH, CONFLICT OF LAWS 242-44 (1949). Compare Home Ins. Co. v. Dick, 281 U.S. 397 (1930), in which the Supreme Court held that two New York corporations were deprived of property without due process, where Texas had applied a statute which *imposed a greater obligation* than the one agreed upon by the parties in a contract made and to be performed outside of Texas.

[1] 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959). See 34 ST. JOHN'S L. REV. 293 (1960).

[2] Matter of Staklinski, *supra* note 1, at 163-64, 160 N.E.2d at 80, 188 N.Y.S.2d at 543.

the court would have similar discretionary power to refuse to confirm this award, it remains that such discretion, if any, was exercised the other way in this case. . . . That exercise of discretion was justified on the facts.[3]

If the tone of this opinion is what it seems to be, it seems likely that one of the most venerable rules of equity is breathing its last in New York.

One of the well-settled principles of equity has been that the courts, as a general rule, will not order specific performance of a building contract.[4] Judicial reluctance to command affirmative relief in this area is typical of the attitude of the courts towards all agreements involving the execution or performance of a continuous series of acts demanding the exercise of one party's individual skill, discretion, taste or talent—of necessity incapable of judicial supervision or control.[5]

It has often been said of the ancient common-law writs that although we have abolished them, they rule us from the grave. This observation might readily be applied to equity's aversion to granting specific performance in the area of construction contracts. As Dean Pound has observed,[6] this attitude is a product of the tenuous position which equity occupied soon after its inception in England. Surrounded by hostility from the long-established courts of law, the chancellor had to be very certain that every order which he made could be enforced, lest the dignity of the equity court be endangered.[7] As a result, equity became extremely reluctant to issue an order the execution of which involved more than a single act, since the court could not, "by its ordinary means and instrumentalities carry out the decree where such continued super-

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[3] Grayson-Robinson Stores, Inc. v. Iris Constr. Corp., 8 N.Y.2d 133, 138, 168 N.E.2d 377, 379, 202 N.Y.S.2d 303, 307 (1960).

[4] See, *e.g.*, Conger v. West Shore & Buffalo R.R., 120 N.Y. 29, 23 N.E. 983 (1890); Beck v. Allison, 56 N.Y. 366 (1874); Queens Plaza Amusements, Inc. v. Queens Bridge Realty Corp., 22 Misc. 2d 315, 36 N.Y.S.2d 326 (1942), *rev'd on other grounds*, 265 App. Div. 1057, 39 N.Y.S.2d 463 (2d Dep't 1943) (memorandum decision); McCormick v. Proprietors of Cemetery of Mt. Auburn, 285 Mass. 548, 189 N.E. 585 (1934); Fiedler, Inc. v. Coast Fin. Co., 129 N.J.Eq. 161, 18 A.2d 268 (1941); Edison Illuminating Co. v. Eastern Pa. Power Co., 253 Pa. 457, 98 Atl. 652 (1916) (dictum). See also 5 CORBIN, CONTRACTS §§ 1171-72 (1951); 5 WILLISTON, CONTRACTS § 1423 (rev. ed. 1937); POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS § 23 (3d ed. 1926).

[5] Standard Fashion Co. v. Siegel-Cooper Co., 157 N.Y. 66, 51 N.E. 409 (1898); Stern v. Fremont Acres, 107 N.Y.S.2d 810 (1951); McCormick v. Proprietors of Cemetery of Mt. Auburn, 285 Mass. 548, 189 N.E. 585 (1934); Sword v. Aird, 306 Mich. 14, 9 N.W.2d 907 (1943).

[6] Pound, *The Progress of The Law-Equity*, 33 HARV. L. REV. 420, 434 (1920). See Oleck, *Specific Performance of Builders' Contracts*, 21 FORDHAM L. REV. 156 (1952).

[7] *Ibid.*

vision is required." [8] Once established, "the old notion, intrenched in textbooks and encyclopedias, dies hard." [9]

Beck v. Allison,[10] decided in New York in 1874, left no doubt as to the position of American courts in this area. In refusing a petition for specific performance of a contract which involved the repair of a building, the court stated that:

> [I]t is obvious that the execution of contracts of this description, under the supervision and control of the court, would be found very difficult if not impracticable, while the remedy at law would, in nearly . . . all cases, afford full redress for the injury. It is for these reasons that *such powers have never been exercised in this country*.[11]

With some minor exceptions,[12] the rule against granting specific performance where extended supervision was required went unchallenged until the landmark case of *Jones v. Parker* [13] in 1895. In that case, Judge Holmes ordered specific performance of a contract providing for the installation of lighting and heating apparatus, declaring that "there is no universal rule that courts of equity never will enforce a contract which requires some building to be done. They have enforced such contracts from the earliest days to the present time."[14]

The decision in the *Jones* case was founded upon the belief that "the difference between the plaintiff and the defendants . . . lies within a narrow compass, and . . . can be adjusted by the court." [15] This was a significant comment, since it recognized that where there was an objective standard capable of determination and application, it would be no great hardship for the court to order specific performance.[16] It is this element of certainty in the contract which provided one of the well-established exceptions to the general rule.[17] As Professor Pomeroy indicated in his work on specific performance,[18] a petition for affirmative relief will generally be granted where the agreement for erecting a building is in its

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[8] Pound, *supra* note 6, at 434.

[9] *Ibid.*

[10] 56 N.Y. 366 (1874).

[11] *Id.* at 370-71 (emphasis added). *But see* Stuyvesant v. The Mayor, 11 Paige 414 (N.Y. Ch. 1845).

[12] Post v. West Shore R.R., 123 N.Y. 580, 26 N.E. 7 (1890) (build railroad crossing); Lawrence v. Saratoga Lake Ry., 36 Hun 467 (N.Y. 3d Dep't 1885) (build a bridge); Jones v. Seligman, 81 N.Y. 190 (1880) (erect a fence). For other cases, see 5 WILLISTON, *op. cit. supra* note 1, at 3977 n.3.

[13] 163 Mass. 564, 40 N.E. 1044 (1895). *But cf.* Fiedler, Inc. v. Coast Fin. Co., 129 N.J.Eq. 161, 18 A.2d 268 (1941).

[14] Jones v. Parker, *supra* note 13, at —, 40 N.E. at 1045.

[15] *Ibid.*

[16] Pound, *The Progress of the Law-Equity*, 33 HARV. L. REV. 434 (1920).

[17] POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS § 23 (3d ed. 1926).

[18] *Ibid.*

nature defined,[19] or the defendant has control of the land upon which the construction is to take place, and the plaintiff has a material interest in the performance which is not susceptible of adequate compensation in damages.[20] Professor Corbin seems to be of the opinion that these alleged exceptions[21] to the general rule amount to nothing more than the fact that "some courts are more liberal than others in their willingness to decree specific performance and less fearful of difficulties."[22] Indeed, the modern test would seem to be whether the potential problems of supervision are so onerous as to outweigh the merits of the petition,[23] or, as the Restatement of Contracts declares, "when the plaintiff's need is great . . . or the public interest is involved, the court does not shrink from the difficulties involved in continued supervision."[24]

There can be no doubt that the tendency in modern litigation is to grant affirmative relief where a building contract is reasonably defined and the petitioner is without an adequate remedy at law.[25] Perhaps the most vigorous statement of this inclination can be found in *Kearns-Gorsuch Bottle Co.* v. *Hartford-Fairmont Co.*,[26] where the court stated that "everything depends on how insistently the justice of the case demands the court's assumptions of difficult, unfamiliar, and contentious . . . problems. The tendency of the times is to 'take on' harder and longer jobs."[27] Though the general rule against undertaking extensive supervision remains in the textbooks and encyclopedias, we may well be near the time when *all* building contracts, with the exception of those which are too uncertain or where the petitioner has an adequate remedy at law, will be specifically enforced.

The principal case raises some interesting questions. It is generally recognized, for instance, that the rule against a court's undertaking extensive supervision is one of discretion, not a lim-

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[19] See, *e.g.*, Southern Pine Fibre Co. v. North Augusta Land Co., 50 Fed. 26 (C.C.D. S.C. 1892); Lawrence v. Saratoga Lake Ry., 36 Hun 367 (N.Y. 1885); Lane v. Pacific & I. N. Ry., 8 Idaho 230, 67 Pac. 656 (1902); Zygmunt v. Avenue Realty Co., 108 N.J.Eq. 462, 155 Atl. 544 (1931); Murray v. Northwestern R.R., 64 S.C. 520, 42 S.E. 617 (1902).

[20] See, *e.g.*, Doty v. Rensselaer County Mut. Fire Ins. Co., 194 App. Div. 841, 185 N.Y. Supp. 468 (3d Dep't 1921); Strauss v. Estates of Long Beach, 187 App. Div. 876, 176 N.Y. Supp. 447 (2d Dep't 1919); Laurel Realty Co. v. Himelfarb, 191 Md. 462, 62 A.2d 263 (1948); Brummel v. Clifton Realty Co., 146 Md. 56, 125 Atl. 905 (1924); McDonough v. Southern Ore. Mining Co., 177 Ore. 136, 159 P.2d 835 (1945).

[21] 5 CORBIN, CONTRACTS § 1172, at 747 (1951).

[22] *Ibid.*

[23] 5 WILLISTON, CONTRACTS § 1423 (rev. ed. 1937).

[24] RESTATEMENT, CONTRACTS § 371, comment *a* (1932).

[25] 5 WILLISTON, *op. cit. supra* note 23, at 3977.

[26] 1 F.2d 318 (S.D.N.Y. 1921).

[27] *Id.* at 319-20.

itation on jurisdiction.[28] Whether or not specific performance of a building contract would be granted was always a question of degree, which involved a weighing of the inconvenience to the court as against the particular merits of the petition. It seems clear that to order the installation of heating and lighting apparatus [29] is one thing; to command the construction of a modern building estimated to cost five million dollars is quite another.[30] As Judge Van Voorhis pointed out in his dissenting opinion, "the decision in the present case lends the enforcement machinery of the courts, to implement specific performance . . . beyond any equitable relief which the courts have heretofore granted. . . ." [31] It may well be asked whether the decision to confirm an award of this magnitude has not all but erased the "degree of supervision required" as a factor to be considered in passing on the merits of any particular petition.

The more important question is whether the Court in the present case had the discretionary power to refuse a confirmation of an arbitration award of specific performance. Chief Judge Desmond, in writing the majority opinion, indicated that it would be "making [a] very large assumption" [32] to answer in the affirmative. The confirmation of the award might easily have been explained by pointing out that the contract in question was reasonably defined, that the defendant was in control of the land upon which the building was to be erected, and that petitioner was without an adequate remedy at law; in short, that this petition was well within the settled exceptions to the general rule.[33] The Court, however, chose to emphasize that a refusal to confirm the award would be "contrary to the command of Article 84 of the Civil Practice Act." [34] This rationale, coming hard on the heels of the *Staklinski* case,[35] in which the court confirmed an arbitration award ordering the specific performance of a contract for personal services, raises a serious question as to whether the Court has become "an administrative rubber stamp over an arbitrator's determination . . . rather [than] a court of equity applying equitable principles and enjoy[ing] a certain latitude of discretion." [36]

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[28] See, *e.g.*, Strauss v. Estates of Long Beach, 187 App. Div. 876, 176 N.Y. Supp. 447 (2d Dep't 1919); McDonough v. Southern Ore. Mining Co., 177 Ore. 136, 159 P.2d 829 (1945).

[29] Jones v. Parker, 163 Mass. 564, 40 N.E. 1044 (1895).

[30] Grayson-Robinson Stores v. Iris Constr. Corp., 8 N.Y.2d 133, 168 N.E.2d 377, 202 N.Y.S.2d 303 (1960).

[31] *Id.* at 139, 168 N.E.2d at 380, 202 N.Y.S.2d at 307.

[32] *Id.* at 139, 168 N.E.2d at 379, 202 N.Y.S.2d at 307.

[33] POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS § 23 (3d ed. 1926).

[34] Grayson-Robinson Stores v. Iris Constr. Corp., *supra* note 32, at 137, 168 N.E.2d at 378-79, 202 N.Y.S.2d at 306.

[35] Matter of Staklinski, 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959). See also 34 N.Y.U. L. REV. 963-65 (1959).

[36] *Id.* at 167, 160 N.E.2d at 82, 188 N.Y.S.2d at 545-46 (dissenting opinion). See also 28 FORDHAM L. REV. 809 (1960).

There can be no doubt that the court must be troubled at the prospect of having to confirm arbitration awards calling for specific performance in situations where, had the matter appeared directly before the court, it might have denied the petition on traditional discretionary grounds.[37] It would seem that the problem might be considerably relieved by amending Article 84 of the Civil Practice Act to provide that in any matter before an arbitrator where he may order specific performance, the execution of which would involve considerable supervision, the arbiter be a technically qualified person, fully capable of and responsible for the enforcement of his award; or, in the alternative, that he have full power to retain such qualified parties to settle disputes which might arise during the ordered performance. It goes without saying that the arbiter's award would always be subject to confirmation by the court. It appears probable that such amendment would relieve the courts from the possibility of long and onerous supervision, inject a certain degree of stability into construction litigation, encourage arbitration in this area, and lastly, remove what is considered in some quarters to be an assault on the traditional discretionary power of courts of equity.

CORPORATIONS — BUSINESS CORPORATION HELD PROPER BENEFICIARY OF REAL PROPERTY TRUST.—Defendant, a business corporation, proposed a liquidation plan calling for the exchange of the corporate realty for trust certificates to be issued to the stockholders by trustees, who were to hold title to the real property, collect its income, and distribute the net income to the holders of the trust certificates. Plaintiff, one of three corporate stockholders of defendant corporation, sought a judgment declaring that the trust agreement was invalid on the ground that business corporations cannot be beneficiaries of trusts of realty. The Supreme Court, Special Term, upholding the validity of the trust agreement, *held* that a business corporation may be the beneficiary of a real property trust. *Alcoma Corp. v. Ackerman,* 26 Misc. 2d 678, 207 N.Y.S.2d 137 (Sup. Ct. 1960).

Prior to the instant case, the law in New York appeared to be that a business corporation could not be the beneficiary of a real property trust.[1] Although a charitable corporation, by statute, can

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[37] Matter of Publishers' Ass'n, 280 App. Div. 500, 114 N.Y.S.2d 401 (1st Dep't 1952).

[1] In the Matter of Norton's Estate, 7 Misc. 2d 342, 343, 155 N.Y.S.2d 838, 839 (Surr. Ct. 1956); In the Matter of DeForest's Estate, 147 Misc. 82, 86,